**BOARD OF APPEALS**
**for**
**MONTGOMERY COUNTY**

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**Case No. A-6187**

**APPEAL OF MARK JOHNSON**

**OPINION OF THE BOARD**
(Hearings held September 26, 2007, January 30, 2008, and June 4, 2008.
Matter decided at the Board's July 23, 2008 Worksession.
Effective Date of Opinion: November 10, 2008)

Case No. A-6187 is an administrative appeal filed November 15, 2006, by Mark P. Johnson (the "Appellant"). The Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in the November 2, 2006, revocation of his Registered Home Occupation #234378, which he conducted from his property located at 6 Bryants Nursery Road, Silver Spring, Maryland 20905, in the RE-2 zone (the "Property"). Specifically, the Appellant asserts that the alleged violations are not true, and that DPS failed to notify him of the alleged violations prior to the revocation.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on September 26, 2007. The hearing was continued to January 30, 2008, and then again to June 4, 2008. The matter was decided at a Worksession on July 23, 2008.

The Appellant was represented by Richard W. Lawlor, Esquire. Assistant County Attorney Malcolm Spicer represented Montgomery County's Department of Permitting Services.

**Decision of the Board**: Administrative appeal **GRANTED**.

## FINDINGS OF FACT

**The Board finds by a preponderance of the evidence that:**

1. The Property, known as 6 Bryants Nursery Road, Silver Spring, Maryland 20905, is an RE-2 zoned parcel identified as Lot 3, Block A in the Norwood Estates subdivision. The Property is 2.11 acres.

2. On February 1, 2005, Appellant Mark Johnson applied for a Home Occupation Permit at the subject Property for his business, A & M Repair and Towing. Pursuant to this application, DPS issued Home Occupation Certificate 234378 to Appellant and A & M Repair and Towing on March 24, 2005. See Exhibit 14(a) at pages 3 and 4.

3. On February 11, 2005, DPS issued a building permit for construction of a garage at the subject Property. See Exhibit 16(e). This permit was finaled on November 14, 2005.

4. On September 18, 2005, DPS issued a Notice of Violation ("NOV") to the Appellant for (1) parking more than 3 commercial vehicles on the subject Property, (2) having more than one (non-resident) employee on the Property, (3) repairing vehicles in connection with the business on the Property, and (4) storage of vehicles in connection with the business on the Property. The NOV instructed the Appellant to perform the following corrective actions immediately: "Cease all of the activities noted above. Comply with all aspect of a registered home occupation." See Exhibit 15(a).

5. In addition, also on September 18, 2005, DPS issued a Uniform Civil Citation to the Appellant for parking more than 3 commercial vehicles (tow trucks) on the subject Property in a residential zone, in violation of Section 59-C-1.31 of the Zoning Ordinance. See Exhibit 15(b).

6. On November 30, 2005, DPS issued a second Uniform Civil Citation to the Appellant. This citation charged Appellant with violating Section 59-A-6.1(c)(10) of the Zoning Ordinance, which pertains to registered home occupations, by parking more than 3 commercial vehicles on the subject Property. See Exhibit 15(c).

7. On March 14, 2006, the District Court of Maryland for Montgomery County issued an Order for Abatement to resolve the violations cited in the September 18th and November 30th Uniform Civil Citations. The Order requires the Appellant to (1) refrain from further violations of Sections 59-A-6.1(c)(10) and 59-C-1.31 of the Zoning Ordinance; (2) refrain from parking more than 3 commercial vehicles on the subject Property; and (3) comply with all orders and directions from DPS in reference to the registered home occupation. The Order also provides that if the Appellant fails to abide by the Order within 30 days by failing to abate the violations and/or refrain from future violations as required by this Order, the County can enter the premises and abate the violations as may be necessary to assure compliance with the Montgomery County Code. See Exhibit 13.

8. On November 2, 2006, DPS sent a letter to the Appellant revoking Registered Home Occupation #234378. The letter states that Registered Home Occupation #234378 is revoked "due to the following reasons:

Multiple violations of the Montgomery County Code including:

> Having more than one non-resident employee on subject property.
> Parking tow vehicles on property with car in tow.
> Conducting commercial vehicle repair on property.
> Use of the new accessory structure for business purposes."

The letter orders all activities related to the registered home occupation to cease immediately, and states that this notification may be appealed to the Board of Appeals within 30 days of receipt. See Exhibit 14(g).

9. Mr. Mark Moran, a Zoning Investigator with the Department of Permitting Services, testified for the County. Mr. Moran testified that his office had received complaints regarding the use of the subject Property for a tow truck business, beginning in January, 2005. He testified that he inspected the Property as a result of a complaint. He testified that he observed more than three commercial vehicles on the Property, and a towing business, with an office and associated vehicles, being operated there. He testified that he advised the Appellant about the need to obtain a home occupation permit, and that he explained the requirements pertaining to home occupations to the Appellant, including the limitation on the number of commercial vehicles.[1] He testified that the Appellant applied for a home occupation with a proposed use of "office use – mobile company, driver picks up truck at location," and that a certificate for the home occupation was issued on March 24, 2005.

   Mr. Moran testified that Section 59-A-6.1(c) of the Zoning Ordinance limits the number of non-resident employees at a registered home occupation to one. See Exhibit 19. He testified that the Appellant was made aware of this limitation when he signed the affidavit on the registered home occupation registration which stated that he had read and understood all the Code sections relating to home occupations. Mr. Moran testified that he did not observe more than one non-resident employee at the Property.

   Mr. Moran testified that between his initial visit in January, 2005, and the time he issued Uniform Civil Citations to the Appellant (September and November, 2005), he visited the Property more than 10 times.[2] He testified that his visits were in response to complaints about continual activity at the subject Property, cars being towed in and out, disabled cars being towed in and kept on the Property, and multiple employees working on cars on the Property.

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[1] Mr. Moran testified that he explained the limitation on the number of commercial vehicles to the Appellant "multiple times." Counsel for the County went on to explain that the limitation is contained in footnote 11 to Section 59-C-1.31 of the Zoning Ordinance (Land Use table). See Exhibit 18, and page 10 of the January 30 Transcript. Section 59-C-1.31, as modified by footnote 11, makes clear that the parking of motor vehicles, off-street, in connection with any use permitted in the zone is allowed in the RE-2 zone, except that "[n]ot more than 3 commercial vehicles and not more than one unoccupied recreation vehicle may be parked on any lot at any one time," and "[a] tow truck is not permitted to park with a disabled car attached."

[2] In response to a Board question, Mr. Moran later testified that he had visited the Property "dozens and dozens of times through the last three years, generally based on complaints."

Mr. Moran testified that when he visited the Property, he noticed more than three commercial vehicles (tow trucks). He stated that at that time, none of the trucks had a disabled car attached. He further testified that on September 18, 2005, he issued a citation to the Appellant for parking more than three commercial vehicles (tow trucks) on the subject Property, which is located in a residential zone, in violation of the home occupation law,[3] and that he also issued a warning Notice.[4] See Exhibits 15(b) (September 18 citation) and 15(a) (Notice of Violation).

Mr. Moran testified that in November of 2005, in response to another complaint, he went back to the subject Property and issued a second Uniform Civil Citation for parking more than three commercial vehicles on the subject Property.[5] He testified that both citations ended up in District Court, where a Consent Order was issued to abate the violations. See Exhibit 13.

In response to a Board observation that DPS' November 2, 2006, letter revoking the registered home occupation did not list the number of commercial vehicles on the Property as a violation, Mr. Moran indicated that that was correct. When asked if that was because the problem with the number of vehicles parked on the Property had been abated, Mr. Moran said "more or less," going on to state that while he couldn't prove that the limitation on the number of vehicles was being violated at the time he issued the citation, he was still receiving complaints about the number of vehicles, and that the affidavits of the neighbors indicated that there were more than three commercial vehicles parked on the Property. Mr. Moran then testified that the November 2, 2006, letter of revocation was based solely on the affidavits of witnesses (neighbors), and that he did not personally witness any of the cited violations.[6] He testified that the neighbors had prepared their affidavits at his request.[7]

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[3] The September 18, 2005, Uniform Civil Citation cites violation of Section 59-C-1.31 of the Zoning Ordinance ("Land Uses"). Footnote 11 to that Section specifies in relevant part that in connection with the off-street parking of motor vehicles in connection with any use permitted in the RE-2 Zone, "Not more than 3 commercial vehicles and not more than one unoccupied recreational vehicle may be parked on any lot at any one time.." It also specifies that "A tow truck is not permitted to park with a disabled car attached."

[4] The September 18, 2005, NOV cites violations of Section 59-C-1.31, Section 59-A-3.4, and Section 59-A-6.1.

[5] Counsel for the County explained that Section 59-A-6.1(c)(10) of the Zoning Ordinance provides that any commercial vehicle that is parked or garaged on site (in a residential one-family zone) in connection with the registered home occupation must comply with the regulations for commercial vehicles set forth in Section 59-C-1.31, Land Uses.

[6] The November 2, 2006, letter cited "Multiple violations of the Montgomery County Code including:

Having more than one non-resident employee on subject property.
Parking tow vehicles on property with car in tow.
Conducting commercial vehicle repair on property.
Use of the new accessory structure for business purposes."

See Exhibit 14(g).

Mr. Moran and counsel for DPS later explained the DPS routinely relies on affidavits as the basis for the revocation of a home occupation if the affiants agree to appear as witnesses and testify to their observations in the event that the person whose home occupation is being revoked requests a trial in District Court.

[7] On cross-examination, Mr. Moran clarified that he did not prepare the affidavits, and that he assumed that the individuals who had signed them had prepared them.

With respect to the alleged violation occasioned by the use of the new accessory structure (garage) for business purposes, Mr. Moran testified that a new accessory building must not be constructed for the purpose of conducting a home occupation, and that an accessory building must have existed for at least 18 months prior to the onset of business activity in order to be used as part of a home occupation.[8] He testified that DPS had issued a permit for Appellant's accessory building (garage) on February 11, 2005, and had finaled that permit on November 14, 2005. He testified that the 18-month time period would commence when the permit was final, and thus he testified the garage could not be used for the home occupation prior to May, 2007. Mr. Moran testified that he knew Appellant was using the garage for various things, and that Appellant claimed to have hobbies such as working on cars, but that the affidavits of the neighbors show continuous use of the garage by the Appellant for business purposes. He reiterated that the violations listed on the November 2, 2006, letter of revocation were not based on his personal observations at the time of issuance.

On cross-examination, Mr. Moran testified that the use for which the registered home occupation was approved was the use listed on the application: "office use – mobile company, driver picks up truck at location." He testified that in response to the two civil citations and the Notice of Violation that he issued in the fall of 2005, a consent and abatement Order was issued by the District Court, and that since that time, he had made numerous trips to the subject Property but had not personally observed more than three commercial vehicles on the Property. He testified that he had included a provision in the abatement Order requiring the Appellant to comply with all orders and directions from DPS in reference to the registered home occupation. He acknowledged that at the time of the abatement Order, he had not taken enforcement action against for the Appellant for any violations of the registered home occupation standards other than for parking more than three commercial vehicles on the subject Property.

Mr. Moran testified on cross-examination that he made numerous trips to the subject Property between the time the March 14, 2006, abatement Order was issued and the issuance of the November 2, 2006, revocation letter. He testified that he visited the subject Property at different times of day, during the week and on the weekends. He testified that he did not go into the residence during this time period, that all of the activity was taking place in and around the garage. He testified that during that time frame, he never saw any tow trucks parked on the Property with a vehicle in tow, that he never saw more than one non-resident employee on site, and that he never saw the Appellant or anyone else conducting commercial vehicle repairs on the Property. He testified that he had discussed with the Appellant when the new garage could be used in connection with the home occupation, telling him that it could not be used for 18 months from

[8] See Section 59-A-6.1(c)(7) of the Zoning Ordinance, which provides that "If an existing accessory building is used for any part of the registered home occupation, there must be no external evidence of such use. No more than one existing accessory building may be used for this purpose. A new accessory building must not be constructed for the purpose of conducting the registered home occupation. For the purpose of this section an accessory building must have existed for at least 18 months prior to the onset of the business activity in order to be used as part of the home occupation."

the date of final inspection, but he did not recall the timing of that conversation. When asked if he had given the Appellant any warning about the violations cited in the November 2, 2006, revocation letter, Mr. Moran testified that he had given the Appellant numerous warnings pertaining to these violations. He testified that he had talked with the Appellant numerous times about the restrictions on the use of the new garage, and that he had told the Appellant that he would revoke the home occupation if the Appellant continued to use the garage. When asked specifically if he had ever warned the Appellant in writing about the violations cited in the November 2, 2006, letter, Mr. Moran testified that he had sent Appellant a warning Notice (the September 18, 2005, Notice of Violation) which included the need to comply with all aspects of the home occupation requirements, and that the abatement Order also indicated that Appellant must comply with all aspects of the home occupation code. He testified that he considered that sufficient warning.

In response to a question on cross-examination asking if the September 18, 2005, Notice of Violation, which called for immediate compliance, satisfies Section 59-A-3.43 of the Zoning Ordinance, which indicates that if there is a violation, a warning must be issued requiring correction within 30 days, Mr. Moran testified that he puts “immediately” on all of his Notices, but waits 30 days.

In response to Board questions, Mr. Moran testified that prior to November 2, 2006, he had provided Appellant with verbal warnings regarding having more than one (non-resident) employee, regarding the parking of a tow truck with a car in tow, regarding commercial vehicles in violation of the abatement Order, and regarding the use of the new garage in violation of the Zoning Ordinance. He testified that Inspector James C. Martin was with him when he issued these warnings.

In response to another Board question inquiring about the usual sequence of notices involved with the revocation of a home occupancy permit, Mr. Moran testified that typically, one Notice is issued, then citations. He testified that for registered home occupations, that is followed with a warning, and then the revocation. He testified that this was the first case he had dealt with in which a registered home occupation had been revoked. In response to follow-up questions on cross-examination, Mr. Moran testified that it is standard practice, but not required, for an inspector who observes a violation to issue a Notice of Violation to the person conducting the home occupation, and also to issue a civil citation with a penalty of up to $500 if the person is in violation of the home occupancy regulations. In response to additional cross-examination, Mr. Moran testified that he did not issue any Notices of Violation or civil citations to the Appellant between March 14th and November 2nd, 2006.

When asked by a Board member if he had witnessed a broken down red tow truck in the garage in pieces and smashed, as alleged in the July 13, 2006, entry in the affidavit of Mike and Ann McCartin, Mr. Moran testified that he was on the Property at that time, and that the Appellant had told him that his tow truck had rolled and was damaged, and that he was keeping it in the garage for an

insurance adjuster to come and look at it. Mr. Moran went on to testify that he did not see that as a violation at that time. In response to follow-up questions on cross-examination, Mr. Moran clarified that when he observed the damaged tow truck, it was still within the limit of three commercial vehicles on the Property, and that he did not view the fact that the truck was parked in the garage as a violation of the prohibition on use of an accessory building.

10. Ms. Hermalene Taylor testified for the County. Ms. Taylor testified that she lives across the street from the subject Property, at 5 Bryants Nursery Road.[9] She testified that she is generally home during the day, and that she has had occasion to observe the Appellant's Property from time to time. She testified that she started documenting information about Appellant's tow truck business in 2005. She also testified that she has spoken with Mark Moran on occasion.

    Ms. Taylor testified that she prepared the affidavit dated October 16, 2006,[10] which is in the record as Exhibit 14(f). She testified about the various observations of activity at the subject Property which are set forth in that affidavit, and which she believes support a conclusion that the Appellant's registered home occupation was being operated in violation of the code provisions called out in her affidavit.

    Pursuant to a question from the Board, Ms. Taylor clarified that the four paragraph narrative on the last page of her affidavit (marked as page 28, Exhibit 14(f)) was not her narrative, but rather was a piece that she and the other two neighbors had put together. In response to follow-up questioning from counsel for the Appellant, Ms. Taylor testified that she did not type home occupation standard 7, found on the second page of her affidavit, but rather that it had come from her neighbors. She testified that she and her neighbors worked as a team, and that the citation was appropriate. She stated that by signing the affidavit, she adopted it as her statement. She reiterated that she wrote what she saw. In response to a question from counsel for the Appellant regarding whether or not she had written the paragraph below standard 7, which begins "Mr. Johnson uses two accessory buildings…," Ms. Taylor testified that she did not write that paragraph, but that it was written by her neighbor Ann McCartin. She then testified that none of her observations indicate that Appellant used two buildings for his business. She also testified that the definition of home occupation set forth in her affidavit at page 26 of Exhibit 14(f) (Section 59-A-2.1 of the Zoning Ordinance), and the excerpt from the Land Use table (Section 59-C-1.31 of the Zoning Ordinance) set forth in her affidavit at page 27 of Exhibit 14(f), were both supplied by Ms. McCartin. Ms. Taylor then testified that she had kept a daily log, and that Ms. McCartin had taken that log and had prepared her (Ms. Taylor's) affidavit.

[9] On cross-examination, Ms. Taylor clarified that her home faces the garage area of Appellant's Property.
[10] Ms. Taylor clarified that she had filled in her name and address on the form provided by Mr. Moran, and that the daily log contained her observations.

11. Ms. Ann McCartin testified for the County. Ms. McCartin testified that she resided at 10 Bryants Nursery Road, which abuts the rear of the subject Property (where Appellant's garages are), for 17 years, but that she no longer lives there.[11] She testified that she first observed Appellant's tow truck business shortly after he moved in, but that she did not start making notations about it until fall, 2005.

    Ms. McCartin testified that she had contacted DPS numerous times about activity on the subject Property. With respect to her affidavit, which is in the record as Exhibit 14(b), she testified that she had made 95 percent of the observations therein, that her husband had made the rest. She stated that her observations were marked in her calendar as well. She further stated that she had taken the photographs, in the record as Exhibit 14(c), and that they showed some of the things she had observed and recorded in her daily log. She then testified about the various observations of activity at the subject Property which are set forth in her affidavit, which she believes support a conclusion that the Appellant's registered home occupation was being operated in violation of the Code provisions and standards listed in her affidavit.

    Ms. McCartin testified that in preparing the affidavits, she and the other two neighbors had made daily logs of everything that they felt were violations, and that they had then organized their observations to show which observations they felt violated which sections of the County Code. For example, she testified that under standard 2, referring to having more than one non-resident employee, she listed the 11 dates on which she had observed more than one employee on her log. Under Section 59-C-1.31, which provides that no tow truck can be parked with a disabled vehicle attached, Ms. McCartin testified that she had summarized all of the dates on which she observed a disabled vehicle attached to the tow truck and on the Property.[12]

    On cross-examination, Ms. McCartin testified that she had pulled home occupation standards 2 and 7, the definition of home occupation, and excerpts from Section 59-C-1 from the County Code, and had inserted them into the affidavits. She testified that the narrative statement at the end of each of the affidavits was hers, but that she had met with the other neighbors to discuss it first. She testified that she assembled the affidavits for all of the neighbors, meeting with them before and after to ensure that they were correct. She testified that she wrote the statement that the Appellant uses two accessory buildings for his business, and that all of the neighbors had read and signed it. She testified that she did not include any observations in her daily log to support this assertion. She testified that she had seen the Appellant construct the larger (new) garage, and that it was not connected to the previously-existing garage, but rather that the two structures were "back to back," and were separated by a couple of inches. She testified that she had constructed a six foot fence between

[11] On cross-examination, Ms. McCartin stated that she had sold her property in June of 2007.

[12] On cross-examination, it was brought out that in general, Ms. McCartin assumed (but did not know) that all the vehicles she saw were disabled. It was also brought out that Ms. McCartin assumed the vehicles belonged to someone other than the Appellant.

her property and the subject Property; she was not sure when the fence was constructed. She testified that she can see the new garage when she drives by and from her kitchen window.

On cross-examination, Ms. McCartin testified in response to a question asking if she knew who lived in Appellant's home, that he lived there with his wife and step-son. She testified that she didn't know if anyone else lived there, and acknowledged that if someone else were living there, she would not know who they were.[13]

In response to a Board question asking Ms. McCartin how many tow trucks she had observed with the company name on them, Ms. McCartin testified that at one point, there were six, then five, then four. She testified that at one point they had two battery vans, but then only one battery van, and four tow trucks. When asked specifically about the time period between April, 2006, and October, 2006, Ms. McCartin testified that at some point, the battery vans were gone, but that Appellant had four tow trucks. She concluded that there were at least four commercial vehicles at all times.

12. Mr. Alberto Ienzi testified for the County. Mr. Ienzi testified that he lives at 1 Bryants Nursery Road, across the street from the Appellant. He testified that he submitted an affidavit, in the record at Exhibit 14(d), along with some photographs. He then testified about the activity he observed at the subject Property, as set forth in his affidavit.

Mr. Ienzi testified that since September, 2006, he has observed other vehicles being towed to the Property and dropped on numerous occasions.

On cross-examination, Mr. Ienzi testified that he has lived at his house since 1984, and has been retired since 2000. He testified that he knows that Appellant, his wife, and step-son live at the subject Property, but that he doesn't know if Appellant has another son living there. He testified that he doesn't know Appellant's extended family and friends, or those of his wife or step-son.

He testified that Ann McCartin prepared his affidavit, that he told her what to write for the various days, and that she typed it. He testified that the notations at the end are their notes, together.

Mr. Ienzi testified on cross-examination that it was possible that some of the vehicles about which he testified belonged to the Appellant, and that he did not know whether they were disabled or not.

13. Mr. Mark Johnson, Appellant, testified on his own behalf. He testified that he lives at 6 Bryants Nursery Road. He testified that his Property faces Norwood Road,

[13] This testimony was given at the January 30, 2008, hearing. At the June 4, 2008, hearing, Ms. McCartin testified that she knew that the Appellant, his wife, and his step-son lived at the Property, and that another son was occasionally at the Property.

as does the Ienzi property, the driveway of which is across Bryants Nursery Road from his driveway. He testified that the Taylors live behind him, and that the McCartins used to live behind him to the east, but that that property had since been sold to the Petersons.

Appellant testified that Exhibit 16(i) shows his Property, indicating that the house is in the center of the Property, and the outbuildings are to the rear. He testified that he attached a 30x40 foot prefabricated structure to the existing outbuilding, and that that structure is the new "garage." Appellant testified that he obtained a building permit for the new garage on February 11, 2005, and that construction was complete within six weeks. See Exhibit 16(e).[14] He testified that for the 12 month period between April, 2005, and March, 2006, he did not use this structure for business purposes, per the instruction of Mark Moran.[15] He testified that he insulated it during this time, and that he moved equipment in for vehicle restoration work, testifying later that he has a car lift, but not a truck lift. He testified that his son and his friends work in the garage restoring cars.

In addition, Appellant presented photographs of his Property. See Exhibits 35-38. He testified that Exhibit 37 shows that the new garage is attached to the original garage. He testified that Exhibit 35 shows the interior of his garage addition, and depicts his 1953 convertible, which he is restoring, on the lift. He testified that this photograph also shows a small door connecting to the original structure.

Appellant testified that on June 6, 2006, one of his flatbed tow trucks rolled, and that he put it in the new garage. He testified that he discussed this with Mark Moran, telling Mr. Moran that the insurance company would be out to look at it in about 25 days, and that Mr. Moran said that it was better to keep it in the garage. Appellant testified that a salvage company came to get the truck in July, 2006, after a settlement was reached.

Appellant testified that between the March 14, 2006, issuance of the abatement Order and the November 2, 2006, issuance of the letter of revocation, Mr. Moran came out to his Property 40 times. He testified that Mr. Moran did not always come in, that he came at all times of the day, and that sometimes he would drive by, sometimes he would park. He testified that pursuant to the abatement Order, Mr. Moran was allowed to inspect the Property at any time. Appellant testified that Mr. Moran came to his Property on September 2, 2006, and told him that nothing was wrong at that time. When asked if Mr. Moran ever said that anything was wrong, Appellant testified that he (Mr. Moran) always said "not at this time."

Appellant testified that Exhibit 39 depicts his storage facility on Oakmont Avenue. He testified that this is the location to which he tows vehicles, and that one of his tow trucks is stored there. He testified that he had a lease for this Property from

[14] On cross-examination, Appellant testified that the County had told him that his garage was finished when the framing was complete, that that was when the County considered that you could start using the building and moving your belongings in.

[15] Appellant testified that Mr. Moran told him that he could use the garage for his registered home occupation after one year.

August, 2003, until December, 2007, and that he now has a new leased facility. See Exhibit 16(d). He testified that his certificate of occupancy for this property proves that the lot was used for the operation of a business, and reiterated that his tow trucks brought disabled vehicles to this lot, not to his residence (the Property). See Exhibit 16(d) at page 22.

Appellant testified that he lives with his wife and his step-son Todd. He testified that his son Richard Johnson is there for three months in the summer, one and a half weeks at Christmas, and during spring break. He testified that he has a cleaning lady who comes once a week, a visiting nurse, and friends of his children who visit his Property. He testified that some children who attend summer school at Blake High School park at his Property.

Appellant testified that he employed a female dispatcher from late 2005 until July, 2006, at which point she took medical leave until November, and then left. He testified that he now does the dispatching himself. He testified that his dispatcher would bring her vehicle to work. He testified that one tow truck driver would also leave his vehicle on the Property when he went out in the tow truck.[16]

Appellant testified that Department of Transportation ("DOT") regulations require that heavy vehicles like tow trucks have daily pre- or post-trip inspections, and be examined annually. He testified that he usually does pre-trip inspections, which take about 25 minutes. See Exhibit 16(g) at pages 26-29. Appellant testified that a DOT inspection can result in the need to change lights, add oil, or put air in tires. He testified that the penalty for failing to do a daily inspection is inspection by the State, which he testified carries a $500 minimum fine if they find nothing wrong, going on to say that they usually find something wrong which takes the vehicle out of service. He testified that if the truck was stored in the garage and the weather was bad, these inspections may have been done in the garage. He suggested with respect to various dates that these DOT inspections may have been the "work" observed by his neighbors.

Appellant testified that the only disabled truck he could ever recall being brought to his Property was his own damaged tow truck. He testified that there are no commercial repairs done on site, and that he trades off [repair] work with people that his company tows for. He testified that his employees do not work on their vehicles at his Property.

Appellant testified that he owns and has owned numerous vehicles, as reflected in Exhibit 16(h). Appellant described title to a 1999 Isuzu Rodeo, which he said he had bought for his wife at auction, had taken for inspection, and had brought home and put on a lift to change the oil. He noted that he had included an October 14, 2006 work order for Maryland State inspection of that vehicle. He testified that he had a 2002 boat trailer, and that the boat and trailer were on his Property. He testified that he had a 1996 Dodge pickup truck, and a 1994 Dodge

[16] Appellant testified that he had been told by the County that having employees drop off cars at the Property and pick up trucks was fine.

pickup truck. He testified that the 1994 pickup was shown in one picture, and that he had sold it after the transmission had failed. Appellant testified that he owned a 2000 Ford Excursion, which he used for weekends and travel. He testified that he had a 1988 Suzuki Samurai, which he testified got better gas mileage than a pickup. He testified that he had a 1984 Oldsmobile, which was being restored by the boys, a 1953 BelAir, which was also being restored, and a 1991 Ford pickup truck that he had since sold. He testified that he keeps all of the vehicles on his Property, and that he works on them there.

Appellant testified on cross-examination that his company is A&M Repair and Towing, and that the vehicles used for the business are titled in the business name. He testified that in April, 2006, he had four tow trucks and one service truck (two flatbeds, two red wheel lifts (hooks) (one light duty, one heavy duty), and one service van). He testified that he kept the two wheel lift trucks at his Property, but that others were kept off-site. He testified that on June 6, 2006, his red flatbed truck was in an accident, and was not replaced, so at that time, he testified he had one (white) flatbed, two red hook trucks, and one service van. He testified that in August, he rotated his trucks such that one of the red hooks was kept at the storage lot, and the white flatbed was kept at his Property. He testified that he may also have had the service van at the Property while he was training a new operator. He testified that subsequent to the March 14th abatement Order, he made sure to only have two trucks on his Property at all times—even though he was allowed to have three—so that if Mr. Moran came by, he would be in compliance.

Appellant prepared a written response to many of the observations recorded in the affidavits of his neighbors, and testified about that response. He testified from his perspective about what he believed the neighbors actually saw versus what they may have thought they had seen, offering testimony to discredit observations which the neighbors believed evidenced activities that would violation the registered home occupation requirements. See Exhibit 16(a).

14. Appellant timely noted this appeal.

## CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government exclusive of variances and special exceptions, appealable to

the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. The Appellant in this case challenges the November 2, 2006, revocation of his Registered Home Occupation #234378, which he conducted from his Property located at 6 Bryants Nursery Road, Silver Spring, Maryland 20905, in the RE-2 zone. Specifically, the Appellant asserts that the alleged violations are not true, and that DPS failed to notify him of the alleged violations prior to the revocation.

4. Taking Appellant's assertions in reverse order, the Board finds that the notice provided to the Appellant regarding the revocation of his registered home occupation was not sufficient to comply with the procedural safeguards of Section 59-A-3.43(d)(1) of the Zoning Ordinance ("Compliance and Enforcement"), which provide in relevant part that:

    (d) If the Department determines at any time that there is a violation, a warning must be issued, and the violation must be corrected within 30 days. If it is not corrected, the Department must notify the operator of the home occupation or home health practitioner's office that either:

        (1) The home occupation or home health practitioner's office must cease immediately; or
        (2) [not applicable].

Specifically, the Board finds that because the result of a failure to correct the noticed violation is the immediate cessation of operation of the registered home occupation, this Section must be interpreted to require a written warning which describes the violation with enough specificity that appropriate corrective action could be reasonably ascertained and undertaken. The Board further finds that between the March 14, 2006, issuance of an abatement Order by the District Court (which presumably resolved outstanding violations on the Property), and the November 2, 2006, letter of revocation, there is no evidence to indicate that Appellant ever received a written warning that his registered home occupation was operating in violation of the following restrictions imposed on registered home occupations by the County Code:

> Having more than one non-resident employee on subject property.
> Parking tow vehicles on property with car in tow.
> Conducting commercial vehicle repair on property.
> Use of the new accessory structure for business purposes.

The Board notes that Mr. Moran testified that no written warning was given to the Appellant regarding the violations listed on the November 2nd letter of revocation other than (1) the September 18, 2005, Notice of Violation, and (2) the March 14, 2006, abatement Order, which focused on curtailing the parking of more than three commercial vehicles at the subject Property. The Board acknowledges that both the September 18, 2005, NOV, and the March 14, 2006, abatement Order, included a

general requirement that Appellant comply with all aspects of the home occupation code.

Mr. Moran testified repeatedly that he did not personally witness any of the violations listed in the November 2, 2006, letter of revocation, but that they were based solely on the affidavits of neighbors. He testified that he made numerous trips to the subject Property between the time the March 14, 2006, abatement Order was issued and the issuance of the November 2, 2006, revocation letter, visiting the subject Property at different times of day, during the week and on the weekends,[17] and that during that time frame he never saw any tow trucks parked on the Property with a vehicle in tow, that he never saw more than one non-resident employee on site, and that he never saw the Appellant or anyone else conducting commercial vehicle repairs on the Property.[18] He testified that he had discussed with the Appellant the time at which the new garage could be used in connection with the registered home occupation, but he did not recall the timing of that conversation. The Board finds that these facts bolster the credibility of Appellant's assertion that since the issuance of the abatement Order, he had been told by Mr. Moran, each time he visited, that his registered home occupation appeared to be in compliance with the Code at that time.

Even accepting Mr. Moran's testimony that although he had not witnessed any of the cited violations during any of his inspections, he had given Appellant verbal warnings about the need to comply with the pertinent Code provisions, the Board finds that verbal warnings do not satisfy the requirements of Section 59-A-3.43(d) of the Zoning Ordinance. Despite the admittedly large number of DPS inspections which took place subsequent to the abatement Order and prior to the issuance of the revocation letter, and despite past receipt of an NOV and civil citations, subsequent to issuance of the abatement Order, the Appellant did not receive another NOV or uniform civil citation to indicate that his registered home occupation was being operated in violation of any section of the County Code. Thus the Board finds not only that the Appellant had no way to know that DPS had determined that new violations existed, but also that he did not receive a warning and opportunity to correct those violations, as required by Section 59-A-3.43(d) of the Zoning Ordinance. The Board further finds that the reiterations of a need for general compliance with the all Code provisions set forth in the September 18, 2005, NOV and March 14, 2006, abatement Order cannot be said to constitute sufficient warning of the violations listed in the November 2, 2006 letter, and are thus insufficient to meet the requirements of Section 59-A-3.43(d) of the Zoning Ordinance with respect to the noted violations. Given the severity of the consequences—the revocation of Appellant's registered home occupation—the Board concludes that the warning procedure included in Section 59-A-3.43(d) must be carefully adhered to and strictly construed against the enforcing agency (i.e. DPS). See *McDonnell v. Commission on Medical Discipline*, 301 Md. 426, 436, 483 A.2d 76 (1984).

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[17] Appellant testified that Mr. Moran had visited or driven by his Property 40 times during the subject time period, at all times of the day.

[18] The Board acknowledges Mr. Moran's testimony that he had given the Appellant numerous verbal warnings about the need for compliance with various provisions pertinent to a registered home occupation, including verbal warnings regarding having more than one (non-resident) employee, regarding the parking of a tow truck with a car in tow, regarding commercial vehicles in violation of the abatement Order, and regarding the use of the new garage in violation of the Zoning Ordinance. The timing of these warnings was not specified.

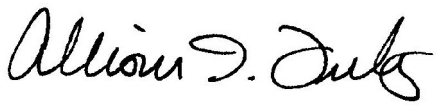
5. Having found that prior to the revocation of his registered home occupation, Appellant did not receive adequate warning of or opportunity to correct the alleged violations, as required by Section 59-A-3.43(d) of the Zoning Ordinance, the Board declines to address the sufficiency or veracity of the stated grounds for revocation.

6. Based on the foregoing, the Board finds that DPS has not met its burden of demonstrating by a preponderance of the evidence that Registered Home Occupation 234378 was properly revoked.

   The appeal in Case A-6187 is **GRANTED.**

On a motion by Member David Perdue, seconded by Member Catherine G. Titus, with Chair Allison I. Fultz in agreement and Member Wendell M. Holloway necessarily absent, the Board voted 3 to 0 to grant the appeal and adopt the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
This 10th day of November, 2008.

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Katherine Freeman
Executive Director

**NOTE**:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board

and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).